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No. 99-2072

In the Supreme Court of the United States

HEALY TIBBITTS BUILDERS, INC., PETITIONER

v.

ROBERT CABRAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, a party challenging a district director's award of attorney's fees for work performed before the district director has a right to a formal hearing before an administrative law judge when no factual issues are in dispute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-17a) is reported at 201 F.3d 1090. The decision and order of the Department of Labor's Benefits Review Board (Pet. App. 18a-26a), orders of dismissal of the administrative law judge (Pet. App. 27a-30a), and orders of the District Director in the Department's Office of Workers' Compensation Programs (Pet. App. 31a-37a) are unreported.

JURISDICTION

The court of appeals entered its judgment on February 2, 2000. Pet. App. 3a. A petition for rehearing was

denied on March 28, 2000. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on June 26, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA) provides compensation for workers who suffer death or disability while employed on the navigable waters of the United States or on certain adjoining land areas. 33 U.S.C. 908, 909; see also *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 125 (1995). Claims for compensation are filed with a district director of the Department of Labor's Office of Workers' Compensation Programs. See 33 U.S.C. 913(a), 919(a).[1] The district director has "full power and authority to hear and determine all questions in respect of such claim[s]." 33 U.S.C. 919(a).

Prior to 1972, district directors conducted hearings on claims for compensation filed under the Act. In 1972, however, Congress directed that

> [n]otwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5 of the United States Code. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this Act, on [October

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[1] Although the LHWCA refers to "deputy commissioner[s]," the title of those officials was changed to "district director" by regulation. See 20 C.F.R. 701.301(a)(7), 702.105. Accordingly, we use the title "district director" throughout this brief to refer to both the present district directors and the former deputy commissioners.

> 27, 1972], in the [district directors] with respect to such hearings shall be vested in such hearing examiners.

See Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 14, 86 Stat. 1261 (33 U.S.C. 919(d)).

District directors, however, retained their authority to resolve claims informally when no hearing is needed and to issue appropriate compensation orders. See 33 U.S.C. 919(c) and (e); 20 C.F.R. 702.315(a). If a hearing is necessary, the district director must transfer the case to an administrative law judge (ALJ), who issues a compensation order after conducting a hearing. 20 C.F.R. 702.348, 702.349.

Persons dissatisfied with a compensation order entered by a district director or an ALJ have 30 days to file an appeal to the Department of Labor's Benefits Review Board (Board). 33 U.S.C. 921(a) and (b); 20 C.F.R. 702.349, 702.350, 702.391. The Board is "authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under [the LHWCA]." 33 U.S.C. 921(b)(3). The Board's orders must "be based upon the hearing record," and findings of fact in the decision under review are "conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. 921(b)(3). Board decisions, in turn, are reviewable in the courts of appeals. 33 U.S.C. 921(c).

In certain cases, the employer may have to pay a claimant's reasonable attorney's fee. 33 U.S.C. 928(a) and (b). Distinct from the administrative process governing compensation orders, Congress authorized each entity involved in the claims process independ-

ently to award attorney's fees for claims presented or work performed before it. Thus, the Board and courts have authority to award attorney's fees for work done before them, 33 U.S.C. 928(c), while district directors and ALJs, respectively, have authority to award attorney's fees for work performed before each of them, 33 U.S.C. 928(a), (c) and (d). See also 20 C.F.R. 702.132(a) (persons seeking attorney's fees "shall make application therefor to the district director, administrative law judge, Board, or court, as the case may be, before whom the services were performed"); 20 C.F.R. 702.134(a).

2. After formal proceedings before a district director and a formal hearing before an ALJ, respondent Robert Cabral obtained an award of medical benefits under the LHWCA. Pet. App. 4a, 20a n.1. The ALJ also awarded Cabral attorney's fees for work performed before the ALJ. *Id.* at 20a n.1. The district director subsequently issued a compensation order requiring petitioner to pay Cabral $332.50 in attorney's fees for work performed before the district director in the case. *Id.* at 4a, 33a-37a. Petitioner filed a motion for reconsideration, arguing that fees could not be awarded for work performed prior to the time that Cabral's attorney became the attorney of record. *Id.* at 4a. Petitioner's motion also requested a formal hearing before an ALJ if reconsideration was denied. *Id.* at 4a-5a. The district director denied reconsideration, making only a minor mathematical adjustment that reduced the award to $309. *Id.* at 31a-32a.

Petitioner did not appeal the district director's order to the Board, but instead repeated its request for an ALJ hearing. Pet. App. 5a, 20a, 24a. The district director transferred the matter to the Office of Administrative Law Judges. *Id.* at 5a. The ALJ dismissed the

matter for lack of subject-matter jurisdiction. *Id.* at 29a-30a. The ALJ reasoned that, because petitioner challenged only the amount of the fee awarded for services performed, the district director's award of attorney's fees was a purely discretionary act reviewable by the Board, and thus not subject to independent review and factfinding by an ALJ. *Id.* at 29a.

3. The Board affirmed. Pet. App. 18a-26a.[2] The Board explained that fee disputes must be referred to an ALJ only when they involve disputed questions of fact, and not when they involve purely discretionary acts of the district director or strictly legal issues. *Id.* at 22a. Because the present case challenged the district director's discretionary act establishing the number of compensable hours and raised a legal question concerning petitioner's liability under the Act, the Board affirmed the dismissal of petitioner's request for an ALJ hearing. *Id.* at 23a-24a.

The Board also concluded that it lacked jurisdiction to review the merits of the district director's attorney's fee award because petitioner did not appeal to the Board within 30 days after the district director's denial of reconsideration. Pet. App. 24a.

4. The court of appeals affirmed. Pet. App. 3a-17a. The court held that the LHWCA does not "confer an absolute right to a hearing before an ALJ," regardless of whether additional fact-finding is required. *Id.* at 7a. Tracking the language of 33 U.S.C. 919(d), the court explained that the LHWCA requires ALJ hearings to be held only on those matters with respect to which district directors were required to hold hearings prior to 1972. Pet. App. 7a. Prior to 1972, "[p]urely legal dis-

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[2] The Board made a minor $.50 mathematical correction in the amount of the award. Pet. App. 20a n.2.

putes or those that did not require fact-finding obviously did not necessitate an evidentiary hearing conducted by the [district director]," and, accordingly, "such disputes are not within the jurisdiction of the [Office of Administrative Law Judges]." *Id.* at 9a.

The court noted, moreover, that the procedure for attorney's fees under the LHWCA "is markedly different from the one for establishing liability and compensation on the underlying claim," Pet. App. 13a, in that the Act expressly assigns authority directly to the district director to make fee awards for work performed before that office. Because attorney's fees awards are "based on qualitative, subjective facts that are uniquely within the knowledge of the body before which the attorney appeared," *ibid.*, adding an ALJ hearing to the process, the court concluded, would "merely produce[] additional delay," and be "inefficient" and "illogical." *Id.* at 12a.

ARGUMENT

1. Petitioner contends (Pet. 11-12) that this Court's review is warranted because the court of appeals' decision conflicts with a two-decade old Seventh Circuit decision. No square conflict exists, however. In *Pearce* v. *Director, OWCP*, 647 F.2d 716 (1981), the Seventh Circuit held that a claimant's disputed request to convert an award of periodic compensation payments into a lump-sum award was subject to a hearing and determination by an ALJ, and hence that the district director's order denying the request for a hearing was beyond his authority. *Id.* at 722. The court, however, held only that "the right to a hearing applies to all claims and applications for *workmen's compensation benefits*." *Ibid.* (emphasis added). No claim for attorney's fees was involved in *Pearce*, and the court

had no occasion to address the availability of ALJ hearings on attorney's fees matters in light of Congress's express provision that attorney's fees decisions be made separately by each body before which counsel appeared. As the court of appeals noted in the present case, the procedure for attorney's fees under the LHWCA "is markedly different from the one for establishing liability and compensation on the underlying claim." Pet. App. 13a. Thus, that part of the *Pearce* decision concerning the respective jurisdictions of district directors and ALJs over compensation claims —which no panel within the Seventh Circuit and no other court of appeals has ever cited favorably—sheds little light on how that circuit would resolve the narrow attorney's fee question presented in this case, in light of the distinct statutory structure for litigating such fees.[3]

The court of appeals (Pet. App. 14a) characterized its decision as "at odds" with *Pearce* only to the extent that the Seventh Circuit construed 33 U.S.C. 921(b)(3) as establishing that a hearing was a necessary predicate for Board review. See *Pearce*, 647 F.2d at 724. The *Pearce* court's construction of Section 921(b)(3) does not appear to have been critical to its decision, however. First, in *Pearce* and unlike in the present case, a factual dispute existed regarding the claimant's request for a lump-sum payment, which could have been sufficient in its own right to necessitate resolution through a

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[3] The *Pearce* decision is in tension with the Fifth Circuit's decision in *Oceanic Butler, Inc.* v. *Nordahl*, 842 F.2d 773 (1988), a case that also did not involve attorney's fees. Moreover, the enduring relevance of *Pearce* has been further undermined by Congress's repeal of the commutation provision at issue in that case. See Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 13, 98 Stat. 1649 (repealing 33 U.S.C. 914(j) (1982)).

hearing. See 647 F.2d at 719 ("the dispute amounted to this: Pearce argued that, under commutation [of the periodic payments], he would get $134.74 per month more under [a separate disability insurance] policy whose benefits he had earned by paying premiums, and [the employer] argued that that difference would most likely soon be absorbed by increases in social security benefits").

Second, the Seventh Circuit also based its decision in part on what it viewed as the agency's noncompliance with its own regulations, which is not an issue in the present case. See 647 F.2d at 722 (discussing regulations on commutation of future benefits that required, among other things, that a district director obtain prior approval of the Director). Dictum that was issued in a distinctly different statutory context and that has never been followed by other panels or other circuits in nearly two decades does not create the type of inter-circuit conflict that warrants this Court's review.[4]

2. Petitioner also contends (Pet. 4-11) that the court of appeals' decision is inconsistent with the language and structure of the LHWCA. Petitioner's argument,

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[4] Petitioner argues (Pet. 10) that the Sixth Circuit "inferential[ly]" construes 33 U.S.C. 921(b)(3) not to permit appeals to the Board from district director decisions, citing *Pyro Mining Co.* v. *Slaton*, 879 F.2d 187, 190 (6th Cir. 1989). *Pyro*, however, held only that ALJs "have jurisdiction to rule on the adequacy of notice given to carriers and employers in black lung cases." *Id.* at 189. The court did not decide any issue concerning ALJ jurisdiction to review district director decisions on attorney's fee applications or disturb the rule that, in black lung cases, decisions of district directors "shall be appealable directly to the Benefits Review Board." 20 C.F.R. 725.366(e). Cf. 30 U.S.C. 932(a) (Black Lung Benefits Act incorporates certain sections of the LHWCA, including its review provisions, "except as otherwise provided in this subsection or by regulations of the Secretary").

however, fails to come to grips with the plain language of the LHWCA, 33 U.S.C. 928, that expressly assigns district directors the independent authority to pass upon the appropriateness of a fee award for work performed before them. Whatever their role in adjudicating compensation claims (see Pet. 5-11), ALJs have no appellate review authority over district directors and they have no authority, statutory or otherwise, to make the discretionary and "qualitative, subjective" judgments (Pet. App. 13a) about the appropriateness of fee awards for work performed before—and thus witnessed exclusively by—the district directors. Indeed, petitioner points to nothing in the LHWCA's plain language that defines when a "hearing" on attorney's fees must be held or that prescribes procedures that courts, the Board, ALJs, or district directors must follow in awarding attorney's fees under 33 U.S.C. 928.

In recognition of the distinct status of attorney's fee applications, moreover, the Director of the Office of Workers' Compensation Programs has promulgated separate regulations governing attorney's fees. 20 C.F.R. 702.132-702.134. Those regulations require attorneys seeking fees to "make application therefor to the district director, administrative law judge, Board, or court, as the case may be, before whom the services were performed." 20 C.F.R. 702.132(a). Consistent with the Act's separate treatment of compensation claims and attorney's fees, see Pet. App. 13a, the Director and Board have concluded that an ALJ hearing is not required when a district director's decision on attorney's fees involves either those discretionary judgments that Congress expressly assigned to the district directors or strictly legal issues, but that such a hearing is required when a fee dispute involves questions of fact. Pet. App. 22a; see also, *e.g.*, *Glenn* v.

Tampa Ship Repair & Dry Dock, 18 Ben. Rev. Bd. Serv. (MB) 205, 207 (1986); *Mazzella* v. *United Terminals, Inc.*, 8 Ben. Rev. Bd. Serv. (MB) 755, 758, aff'd on reconsid., 9 Ben. Rev. Bd. Serv. (MB) 191 (1978); see also *Oceanic Butler, Inc.* v. *Nordahl*, 842 F.2d 773, 784 (5th Cir. 1988) (referral to an ALJ not necessary when it "would merely have produced additional delay, without the possibility of a different outcome").

That interpretation of the Act is reasonable. See, *e.g.*, *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 136 (1997) (Director's interpretation of the LHWCA receives at least some weight). The "hearing[s]" conducted by ALJs must comply with the formal hearing requirements of "section 554 of title 5," 33 U.S.C. 919(d), and under Title 5, formal hearings are not required when no material facts are in dispute. See, *e.g.*, *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620-621 (1973); *Wisconsin* v. *FERC*, 104 F.3d 462, 467-468 (D.C. Cir. 1997); cf. *Mobil Oil Exploration & Producing S.E., Inc.* v. *United Distribution Cos.*, 498 U.S. 211, 228 (1991). Furthermore, absent a factual dispute, an ALJ hearing can perform no meaningful function. The ALJ's adjudicatory capacity has no relevant application to purely discretionary decisions made by the district director, and ALJs have no greater capacity than the district directors to decide questions of law (subject in either case to Board and court of appeals review).

Contrary to petitioner's argument (Pet. 4-7), moreover, the Board's review authority is not confined to cases in which an ALJ hearing has been held. Congress granted the Board authority "to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under [the LHWCA]."

33 U.S.C. 921(b)(3). That authority is not limited to decisions by ALJs after a hearing, but instead reasonably includes decisions by a district director with respect to attorney's fees when there are no material factual disputes. The requirement that the Board's orders "be based upon the hearing record," 33 U.S.C. 921(b)(3), merely indicates that the Board cannot go beyond the hearing record, in cases where such a record exists, either by considering further evidence or by making its own findings of fact.[5]

Petitioner also errs in arguing (Pet. 7-11) that, in 1972, Congress assigned all "adjudicatory" functions to ALJs and left the Director with only administrative and rulemaking functions. Congress assigned the ALJs authority only with respect to matters necessitating "hearings." 33 U.S.C. 919(d); Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 14, 86 Stat. 1261. In fact, Congress simultaneously recognized the authority of district directors, as well as ALJs, the Board, and courts, to approve requests for attorney's fees. See S.

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[5] Petitioner also inaccurately argues (Pet. 5) that 20 C.F.R. 802.301(a) indicates that only evidence that is part of a record developed at an ALJ hearing can be considered by the Board. That regulation states that the Board "is not empowered to engage in a de novo proceeding or unrestricted review of a case brought before it," but is "authorized to review the findings of fact and conclusions of law on which the decision or order appealed from was based." 20 C.F.R. 802.301(a). The regulation does not say that the "decision or order appealed from" must be the decision of an ALJ after a hearing, and 20 C.F.R. 802.201(a)(1) specifically allows an appeal from "a decision or order of an administrative law judge *or deputy commissioner* to the Board" (emphasis added). See note 1, *supra* (substituting term "district director" for "deputy commissioner").

Rep. No. 1125, 92d Cong., 2d Sess. 8 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 9 (1972).[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Nor did this Court "confirm[]" the district directors' "total loss of adjudicatory authority" (Pet. 8) in *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 125 (1995). The Court held only that the Director lacked standing to seek court of appeals review of a Board order because the Director, in that case, was not a "person adversely affected or aggrieved" by the order under 33 U.S.C. 921(c). See *Newport News*, 514 U.S. at 125-136. The case had nothing to do with, and this Court did not address, the authority that district directors retained to determine attorney's fee awards.